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Nos. 88-1382 and 88-1418

In the Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

RAYMARK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners, manufacturers of asbestos insulation products, were sued after shipyard workers were exposed to their products and contracted asbestos-related diseases. Petitioners then sought to pursue third-party tort and contract actions seeking contribution and indemnity from the United States, the employer of the shipyard workers and the owner of the vessels on which they worked. The questions presented are:

1. Whether the petitioners may pursue such third-party actions against the United States on a tort theory when the governing substantive law bars third-party tort actions in the absence of direct tort liability to the underlying plaintiffs, and the United States has no such liability to those plaintiffs.

2. Whether the court of appeals correctly concluded that petitioners' third-party actions against the United States could not be maintained under the Little Tucker Act on an implied reverse warranty theory.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 858 F.2d 712. The opinion of the district court (Pet. App. 21a-45a) is reported at 649 F. Supp. 149.

JURISDICTION

The judgment of the court of appeals (Pet. App 46a-47a) was entered on September 28, 1988. A petition

[1] "Pet. App." citations are to the appendix to the petition in No. 88-1382.

for rehearing was denied on November 21, 1988 (Pet. App. 48a-49a). The petitions for writs of certiorari were filed on February 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Albert and Shirley Lopez were among the numerous plaintiffs who sued petitioners and other manufacturers of asbestos insulation products used at the United States' Puget Sound Naval Shipyard. They alleged that Mr. Lopez and others like him, who were civilian employees of the United States, had been harmed by exposure to the asbestos contained in petitioners' products.[2] The plaintiffs did not sue the United States: Since the shipyard workers were government employees, their exclusive remedy against the United States lay under the Federal Employees' Compensation Act (FECA), which provides no-fault compensation for work-related injury or death. 5 U.S.C. 8101, 8116(c). After the Lopezes settled their claim with petitioners, the petitioners, who had joined the United States as a third-party defendant, sought relief against it under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and the Little Tucker Act, 28 U.S.C. 1346(a)(2).

The district court granted the government's motion to dismiss the third-party actions. Pet. App. 21a-45a. With

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[2] The shipyard workers included members of various trades. The plaintiffs alleged that the shipyard workers were exposed to asbestos dust when insulation containing asbestos was cut, which occurred both in workshops on land and aboard ships, and when old insulation was ripped out of ships. The plaintiffs claimed that petitioners and other manufacturers had failed to warn of the products' dangers or take other precautions to prevent injuries to the shipyard workers. Lopez was a pipe fitter, pipe coverer, and insulator at the Puget Sound Naval Shipyard from 1947 to 1984. Pet. App. 3a.

respect to petitioners' tort claims, the court first noted (*id.* at 23a) that the federal government is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. In the State of Washington, causes of action for tort indemnity have been abolished by statute, and contribution is available only against parties who are liable in tort to the underlying plaintiffs. Since private employers in Washington that participating in the state's workers' compensation program are immune from all tort actions by their employees, they are also immune from third-party actions. Pet. App. 29a-30a. Because the federal government, as a compensation-paying employer under the FECA, is similarly immune from suit by its employees, the district court concluded that the United States is immune from petitioners' third-party tort suits. *Id.* at 31a-32a.

Although that ruling may have been sufficient to dismiss all the third-party tort claims, the district court went on to reject the argument that the third-party actions could be maintained because Lopez could have proceeded with a "dual capacity" vessel owner claim against the United States under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(b). Under Section 905(b), as construed in *Jones & Laughlin Steel Corp.* v. *Pfeifer,* 462 U.S. 523 (1983), a private shipyard, while generally immune from tort actions brought by its employees, could be sued in tort by its employees for its negligence as "vessel owner," and therefore was subject to suits by third parties in that capacity.[3] The district court

[3] Congress amended Section 905(b) in 1984 to bar all actions by shipyard employees against their employers, and hence all third-party actions as well. Longshore and Harbor Workers' Compensation Act Amendment of 1984, Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1641. However, that amendment does not apply here because Congress gave

ruled that even if analogous private liability were tracked through the LHWCA rather than under state law, the claims against the United States could not survive. First, the court explained that since the FECA bars all direct actions, "an employer subject to the LHWCA * * * does not abide in circumstances similar to the United States." Pet. App. 32a. Second, the court noted, Section 903(b) "expressly excepts from coverage [under the LHWCA] employees of the United States or any of its agencies." Pet. App. 32a. Third, the court agreed with the First Circuit's conclusion "that '§ 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute.' " *Id.* at 33a (quoting *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007, 1014 (1985), cert. denied, 476 U.S. 1126 (1986)). The court then concluded, as have all the courts of appeals to consider the question, that claims by shipyard workers injured by exposure to asbestos lack the requisite maritime nexus for admiralty jurisdiction. Pet. App. 33a. Accordingly, even apart from the FECA, Lopez could not have maintained an action against the United States under Section 905(b).[4]

The district court then turned from petitioners' tort theory to petitioners' implied reverse warranty claim. That

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the amendment prospective application only, and Lopez's exposure to asbestos occurred before 1984.

[4] The court also rejected petitioners' claim that, due to their "special relationship" with the government, the United States should be held liable to them in tort. It stated: "In urging that noncontractual indemnity is available in the case at bar, Eagle-Picher is stretching legal concepts beyond their rational borders. To hold the Government liable to Raymark and Eagle-Picher for the Government's alleged negligent use of these manufacturers' alleged defective products is a convoluted attempt to reshuffle liability. This attempt carries with it no logic or justice." Pet. App. 35a. The court further noted that Washington's statutory abolution of tort indemnity likewise compelled dismissal of this claim. *Id.* at 36a.

claim, brought under the Little Tucker Act, sought indemnification from the United States on the ground that, by buying petitioners' products, the government had impliedly warranted to use those products safely. The petitioners based their claim on the proposition that the asbestos insulation products sold to the Navy complied with various military specifications. The district court concluded that to accept petitioners' arguments " 'would truly turn "indemnity on its head," *Santisteven v. Dow Chemical Co.*, 506 F.2d [1216] at 1219 [9th Cir. 1974], since the representation that a product is safe for its intended use normally flows from the manufacturer to the purchaser, not vice versa.' " Pet. App. 43a (quoting *In re General Dynamics Asbestos Cases,* 539 F. Supp. 1106, 1112 (D. Conn. 1982)). Like the district court in the *In re All Maine Asbestos Litigation,* 581 F. Supp. 963 (D. Me. 1984), vacated in part on other grounds, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986), the district court here found it " 'well established that a vendor/vendee relationship creates no implied agreement by the buyer to indemnify the seller for injuries resulting from the use of the purchased product.' " Pet. App. 44a (quoting 581 F. Supp. at 981).[5]

2. The Federal Circuit affirmed. Pet. App. 1a-20a.[6] As to the tort claims, the court made clear that it was relying on Ninth Circuit law. *Id.* at 4a, 14a. It stated that the

[5] The district court also concluded that allowing petitioners' reverse implied warranty action to proceed would be contrary to the Anti-Deficiency Act, 31 U.S.C. 1341. The court determined that the Anti-Deficiency Act would prohibit an express indemnity agreement between the United States and a seller, and reasoned that no such implied agreement could be lawful. Pet. App. 38a-41a. The court of appeals did not rely on that approach. *Id.* at 9a.

[6] Petitioners had appealed to the Ninth Circuit, which transferred the case to the Federal Circuit because of the Little Tucker Act claim. See 28 U.S.C. 1295(a)(2); *United States* v. *Hohri,* 482 U.S. 64 (1987).

district court had "convincingly show[ed]" that, under Washington law, "an employer who carried appropriate workmen's compensation insurance would not be liable to indemnify third parties who were obliged to pay damages to the worker for having negligently caused or contributed to his injury." *Id.* at 19a. It also agreed with the district court and the First Circuit that Lopez would not have been able to bring an action against the United States in its capacity as vessel owner under the LHWCA, so that there was no basis for a third-party action under Section 905(b). Pet. App. 18a-19a.[7]

As to the contract claims, the court of appeals first noted that to establish Tucker Act jurisdiction a claimant must allege the violation either of the express terms of a contract or of a contract obligation implied in fact; an implied-in-law obligation does not state a claim under that Act. Pet. App. 5a. It also noted that "it is not now contended that the contracts or purchase orders contained any written warranties to sellers." *Ibid.* Thus, the question was whether an implied-in-fact obligation could be discerned. The court found that only where the "circumstances strongly supported a factual inference that a warranty was implied" had the courts found such an obligation (*id.* at 7a), and held that there were no such circumstances alleged here. To the contrary, the court of appeals agreed with the district court that "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have supposed at the date of sale by any inference from the circumstances" that such a warranty had been made. *Id.* at 8a-9a. The court's "appreciation of

[7] The court further concluded that petitioners could not bring suit "under traditional judge-made admiralty law" because admiralty jurisdiction is lacking in cases involving the construction or repair of vessels. Pet. App. 15a.

the bizarre and novel nature of the 'reverse warranty' here asserted, and its lack of support in the alleged facts or the court decisions," led it to conclude that "the Tucker Act does not provide means to enforce the alleged warranty here." *Id.* at 10a. In response to petitioners' arguments that an obligation should be implied because the government had provided specifications to manufacturers of asbestos insulation products, and the products were used for military purposes, the court noted that petitioners "do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-Picher, or if they did, whether the difference related to the asbestos content of the material supplied." *Id.* at 7a-8a.

The court of appeals also rejected petitioners' attempt to hold the government liable on the theory that it had failed to disclose superior knowledge regarding the hazards of asbestos. See *American Ship Building Co.* v. *United States,* 654 F.2d 75 (Ct. Cl. 1981). The court stated that the government could "reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government." Pet. App. 11a-12a. Indeed, it expressed its "wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation." *Id.* at 10a.[8]

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[8] The court added that petitioners' effort to secure reimbursement from the United States here was "logically inconsistent" with the result in *Boyle* v. *United Technologies Corp.,* 108 S. Ct. 2510 (1988). In *Boyle,* this Court extended to government contractors the government's immunity from direct suit arising from injuries caused by defectively designed military products when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known

ARGUMENT

1. All three courts of appeals to have considered the matter—the court below, the First Circuit in *In re All Maine Asbestos Litigation (PNS Cases),* 772 F.2d 1023 (1985), cert. denied, 476 U.S. 1126 (1986), and the Third Circuit in *Eagle-Picher Industries, Inc.* v. *United States,* 846 F.2d 888, cert. denied, 109 S. Ct. 490 (1988)—have concluded that manufacturers of asbestos products used at government shipyards may not maintain third-party tort actions against the United States. Each of the arguments petitioners now make in support of their contention that the tort question warrants review by this Court was made in one or the other (or both) of their prior petitions for writs of certiorari. This Court declined to review the decisions of the First and the Third Circuits and, since the Federal Circuit has now followed their lead, there is no reason for this Court to review its decision.

a. Like the First Circuit, the court of appeals here correctly concluded that "[n]egligence claims under [LHWCA] section 905(b)[] are those covered by federal maritime principles." Pet. App. 17a. The common law of admiralty recognized various actions available to shipyard workers, including a strict liability action for "unseaworthiness" by longshore workers injured on a vessel lying in navigable waters. See *Seas Shipping Co.* v. *Sieracki,* 328

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to the supplier but not to the United States." *Id.* at 2518. Thus, the court of appeals explained, if petitioners were as blameless as they assert, "there should be no damage awards on which to base claims for government indemnity or contribution." Pet. App. 13a. In any event, the court of appeals concluded, this "conflict of logic between the government contractor defense and the logic on which the third party alleged liability of the government here is based * * * is a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on the case law as known hitherto." *Ibid.*

U.S. 85 (1946). Congress enacted Section 905(b) in 1972 to replace that unseaworthiness action with a negligence action comparable to that available to longshore and harbor workers at common law. See, *e.g., Drake,* 772 F.2d at 1013-1014. As the First and now the Federal Circuits have concluded, Congress did not intend that negligence action to extend beyond the scope of admiralty jurisdiction. Rather, like the unseaworthiness claim and the common law negligence claim, a plaintiff may bring suit under Section 905(b) only if the suit satisfies the jurisdictional requirements of admiralty law.[9] As the Third Circuit recognized, all the courts of appeals to have considered the matter have concluded "that asbestos-related claims by land-based ship workers bear no significant relationship to traditional maritime activity" (846 F.2d at 896), and thus are outside admiralty jurisdiction as set forth in *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249, 268 (1972). Consequently, there is no basis for such claims under Section 905(b), and hence no basis for third-party actions such as those brought by petitioners.

Eagle-Picher argues (Pet. 12-15) that the conclusion that the maritime nexus test of *Executive Jet* must be satisfied in order to bring an action under Section 905(b) conflicts with decisions of the Fifth, Second, and Ninth Circuits. There is no conflict. With respect to the Fifth Circuit, as

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[9]See *Holland* v. *Sea-Land Service, Inc.,* 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (Section 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Indus., Inc.,* 748 F.2d 297, 298 (5th Cir. 1984) (Section 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); *Harville* v. *Johns-Manville Products Corp.,* 731 F.2d 775, 787 n.9 (11th Cir. 1984) (Section 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties").

noted in our brief in opposition to the petitions filed seeking review of the First Circuit's decision, there may never have been a conflict in result between the First Circuit's decision and the Fifth Circuit's decision in *Hall* v. *Hvide Hull No. 3,* 746 F.2d 294, cert. denied, 474 U.S. 820 (1985). Since that time the Fifth Circuit, sitting en banc in *Richendollar* v. *Diamond M Drilling Co.,* 819 F.2d 124, 125-126, cert. denied, 108 S. Ct. 296 (1987), explicitly ruled (contrary to language in *Hall*) that the maritime nexus test must be met in order for a tort to be actionable under Section 905(b).[10] Thus, there is no longer even a colorable conflict with the Fifth Circuit. Indeed, the court below correctly cited the Fifth Circuit's decision in *Richendollar* in support of its conclusion that plaintiffs must establish a maritime nexus to bring suit under Section 905(b). Pet. App. 17a.

As also noted in our brief in opposition in the First Circuit case, there has never been a conflict with the Second Circuit's decision in *McCarthy* v. *The Bark Peking,* 716 F.2d 130 (1983), cert. denied, 465 U.S. 1078 (1984). There the Second Circuit had originally concluded that the plaintiff, who worked on a permanently anchored vessel used as a museum, was not eligible for compensation under the LHWCA and therefore could not bring an action under Section 905(b). After the ruling in *Director, Office of Workers' Compensation Program* v. *Perini North River Associates,* 459 U.S. 297 (1983), that it is not necessary to meet the maritime nexus test in order to be covered for

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[10] The en banc court stated: "We further hold that to be cognizable under § 905(b), a tort must occur on or in navigable waters * * * and there must be the traditional admiralty nexus. As a consequence, we now reject the suggestion made in *Hall,* 746 F.2d at 302-303, that the pre-*Executive Jet/Foremost Insurance* test for a maritime tort was codified in § 905(b) by the 1972 amendments to the Longshore and Harbor Workers' Act." 819 F.2d at 125-126.

workers' compensation purposes under 33 U.S.C. 902(3) (1982 & Supp. IV 1986), this Court remanded the *McCarthy* case for reconsideration. The Second Circuit ordered the case to go forward, but, as the First Circuit noted, it "was not asked, and did not consider whether § 905(b) jurisdiction required that the *Executive Jet* nexus test be satisfied." 772 F.2d at 1017 n.10.[11]

Similarly, there is no conflict with the Ninth Circuit decisions cited by Eagle-Picher (Pet. 14-15). Like the *McCarthy* case, *Cook* v. *Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985), cert. denied, 475 U.S. 1047 (1986), was a tort suit in which no issue concerning the maritime nexus of the alleged tortious behavior was raised. *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), which is cited by petitioners now and was cited by them in their petitions in the First Circuit case, did not concern a tort suit at all, but rather involved the question whether certain employees were covered by the LHWCA for purposes of receiving workers' compensation. It is well settled that "maritime employment" status under 33 U.S.C. 902(3) (1982 & Supp. IV 1986) for workers' compensation purposes is a broader concept than "maritime nexus" for determining admiralty jurisdiction over a tort action. See *Ramos* v. *Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981); *Sample* v. *Johnson*, 771 F.2d 1335, 1344 (9th Cir. 1985). Accord, *Rohde* v. *Southeastern Drilling Co.*, 667 F.2d 1215, 1218-1219 (5th Cir. 1982); *Thibodaux*

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[11] The First Circuit further explained that "*Perini* was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct." *Drake*, 772 F.2d at 1018. Thus, contrary to Raymark's contention (Pet. 20-24), there is no conflict between this Court's decision in *Perini* and the conclusion that a tort plaintiff under Section 905(b) must establish a maritime nexus.

v. *Atlantic Richfield Co.*, 580 F.2d 841, 846 n. 14 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979).[12]

b. The alternative basis for dismissal of the tort claims adopted by the district court—that the United States' immunity to direct suit is a circumstance mandating dismissal when private parties who are immune to direct suit are insulated from third-party tort liability—is also correct. The Third Circuit adopted that argument in its *Eagle-Picher* decision (846 F.2d at 891-895), and both the First Circuit in the *All Maine Asbestos Litigation* (772 F.2d at 1028-1029) and the court below (Pet. App. 19a) commented favorably on it; no court of appeals has rejected that approach. Petitioners mistakenly argue that Section 8116(c) of the FECA (which makes clear that federal employees may not sue the United States[13]), and Section 903(b) of the LHWCA (which excepts federal employees from that Act) should not be taken into account in making the FTCA-mandated determination whether "a private individual under like circumstances" (28 U.S.C. 2674) would be liable. In petitioners' view, those bars to direct government liability are irrelevant and the United States should be analogized to a private shipyard owner without such statutory protections. But the FTCA refers to the liability of private parties "under like circumstances," and immunity to direct suit by the underlying plaintiff is a circumstance that may not be ignored. See, *e.g.*, *Eagle-Picher Industries* v. *United States*, 846 F.2d at 890.

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[12] Thus, the Federal Circuit's prediction of how the Ninth Circuit would have ruled here was correct. Moreover, the Ninth Circuit has granted interlocutory review of the Hawaii District Court's ruling in *In re All Asbestos Cases*, 603 F. Supp. 599 (1984), petition granted, No. 89-15329 (Mar. 10, 1989), and shortly will consider whether asbestos workers may maintain suits under Section 905(b).

[13] See *Johansen* v. *United States*, 343 U.S 427, 436-440 (1952); *Patterson* v. *United States*, 359 U.S. 495, 496 (1959).

Petitioners' argument that this approach is inconsistent with this Court's decision in *Lockheed Aircraft Corp.* v. *United States,* 460 U.S. 190 (1983)—an argument made in the unsuccessful petitions seeking review of the First and Third Circuit decisions—is without merit. *Lockheed* simply held that the FECA *itself* does not bar third-party tort actions arising out of injuries to federal employees. The Court explained that "the governing substantive law" would determine whether the government's immunity from direct suit would result in dismissal of FTCA third-party tort actions based on underlying suits by FECA-covered plaintiffs. 460 U.S. at 199. Thus, where the governing substantive law permits third-party tort suits against those parties who are immune to direct suits by the underlying plaintiffs, third-party FTCA suits may proceed. See, *e.g., Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963) (in a case arising out of a maritime collision under the old divided damages rule, contribution against the United States would be permitted because immunity to direct suit was irrelevant to such cases); *Doyle* v. *Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382 (1984) (under Illinois law, immunity of employer from direct suit does not immunize it from third-party tort suits). But both the LHWCA and Washington law—the governing substantive law here—preclude third-party tort suits against those immune from direct suits.[14] Therefore, third-party FTCA

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[14] The district court explained (Pet. App. 26a-30a) that, under Washington law, neither employees nor third parties may maintain tort actions against employers. Similarly, in the absence of a dual capacity suit, an LHWCA employer may not be held liable to an employee (see, *e.g., Pichoff* v. *Bisso Towboat Co.,* 748 F.2d 300 (6th Cir. 1984)) or a third party (see, *e.g., Drake,* 772 F.2d at 1019-1022; *Ketchum* v. *Gulf Oil Corp.,* 798 F.2d 159, 161-163 (5th Cir. 1986); *Graco, Inc.* v. *Colberg, Inc.,* 162 Cal. App. 3d 322, 330-335, 208 Cal. Rptr. 461, 470, 473 (1984), cert. denied, 474 U.S. 820 (1985)).

claims based on injuries to federal employees—who are denied a direct cause of action in tort against the United States—must be dismissed.[15]

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[15] This analysis is identical to that made by the Ninth Circuit in *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379, 403-404, cert. dismissed, 379 U.S. 951 (1964). The court of appeals there, anticipating the approach set forth in *Lockheed,* ruled that an airline could not recover tort indemnification from the United States for payments made by the airline to government employee plaintiffs, on the ground that the applicable state law barred recovery against those not liable in tort to the underlying plaintiffs. See *Lockheed,* 460 U.S. at 193 n.3 and 199.

Similarly, in *LaBarge* v. *Mariposa County,* 798 F.2d 364, 367 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), and *Bell Helicopters* v. *United States,* 833 F.2d 1375, 1378 (9th Cir. 1987)—cases relied upon by Eagle-Picher in its petition in the Third Circuit case—the court affirmed dismissals of third-party tort actions against the United States where the government's all-encompassing immunity from *direct* suit was mirrored almost perfectly in the immunity of a private employer under the state workers' compensation bar. While those two cases did not involve the question of what happens when the privately-applicable workers' compensation immunity to direct suit is *not* all-encompassing (as would be the case under the LHWCA if a Section 905(b) suit were available against the employer), the Ninth Circuit recognized that the basic policy of the governing substantive law must control. The FTCA does not instruct a court to disregard immunities uniquely applicable to the United States on the ground that no such immunity could apply to a private party. In *LaBarge*, the court stated: "[T]he statutory language [of the FTCA] refers not to private persons under "the same circumstances," but to those under *similar* circumstances. * * * Because the federal government could never be exactly like a private actor, a court's job in applying the standard [for liability under the FTCA] is to find the most reasonable analogy." 798 F.2d at 367. Virtually identical language is found in *Bell*, 833 F.2d at 1378. Accord, *General Electric Co.* v. *United States,* 813 F.2d 1273, 1275 n.1 (4th Cir. 1987), vacated and remanded on other grounds, 108 S. Ct. 743 (1988) (noting that the FTCA "uses the term 'like circumstances,' rather than 'the same' or 'identical,' circumstances").

c. Petitioner Raymark contends (Pet. 14-18) that the court of appeals erred in affirming the district court's dismissal of its claims for tort indemnification on the basis of Washington state law. Questions of state law do not ordinarily warrant review in this Court (see, *e.g., Butner* v. *United States,* 440 U.S. 48, 57-58 (1979)) and, in any event, Raymark misstates the law of Washington. Washington's 1981 Tort Reform Act explicitly abolished the right of tort indemnity in all cases where trial on the underlying claims had not taken place by July 26, 1981. Wash. Rev. Code Ann. §§ 4.22.040(3), 4.22.920(2)(1988). Since no trial in the instant case was held before that date, there can be no tort indemnity claim. Thus, Raymark's reliance (Pet. 16) on two 1978 state cases—decided three years before the legislature changed the law—is misplaced. Raymark's further reliance on *Glass* v. *Stahl Specialty Co.*, 97 Wash. 2d 880, 885, 652 P.2d 948 (1982), is likewise without merit. There, the Washington Supreme Court, interpreting the Tort Reform Act, made clear that an employer's insulation from third-party liability could be circumvented only by "agreements" between the employer and the putative indemnitee and that "any intent to provide for indemnification must be clearly expressed in the agreement." 97 Wash. 2d at 885-886, 652 P.2d at 951; see Pet. App. 28a. No allegation was made here of such an express agreement, and even if such an allegation had been made, it would have been a claim in contract and thus would be actionable, if at all, only under the Tucker Act.

2. With respect to the third-party contract claim, the court below was the first court of appeals to address petitioners' implied reverse warranty theory. Accordingly, there is no disagreement in the circuits on that issue either. Moreover, the district courts have uniformly rejected such Little Tucker Act claims. See *In re All Maine Asbestos*

Litigation, 581 F. Supp. 963, 972-974, 980-981 (D. Me. 1984), aff'd, 854 F.2d 1328 (Fed. Cir. 1988); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1139-1140 (E.D. Pa. 1984); *In re All Asbestos Cases,* 603 F. Supp. 599, 609-612 (D. Haw. 1984). Accordingly, there is no warrant for review of that claim.

Petitioners assert that the court of appeals based its decision on factual assumptions not warranted by the record. See Eagle-Picher Pet. 18-23; Raymark Pet. 24-25. Even apart from the rule that factual questions do not call for review by this Court, petitioners' arguments ignore the basic thrust of the court of appeals' decision. That decision was based not simply on what petitioners alleged, but also on what petitioners did not—and presumably could not, in good faith—allege.

In essence, petitioners claim that the United States impliedly agreed to indemnify them for any tort liability they might incur as a result of federal employees' exposure to the asbestos-containing products they produced in accordance with military specifications. As the courts below stated, however, such implied reverse warranty claims find little support in precedent.[16] There could be a plausible basis for such a claim only upon an allegation that the military specifications differed in a pertinent respect from products that petitioners had produced for its private commercial customers. Absent a showing that the specifications so differed, the courts would have no basis for inferring that the government, unlike other purchasers, had warranted to reimburse petitioners for their own tort

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[16] The court below noted (Pet. App. 8a) that "[e]ven in a 'reverse warranty' claim * * * against a private company where the concept of implied warranty is not confined to implied-in-fact cases, it has been held the alleged warranty cannot be implied. *White* v. *Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981)."

liability based on defects in their products. But petitioners made no such claim.[17]

Moreover, as the court below recognized (Pet. App. 12a-13a), petitioners' implied reverse warranty claim is inconsistent with the military contractor defense as set out in *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988). That defense allows a contractor that merely followed precise government specifications and warned the government of any dangers known to it, but not to the government, to avoid liability. In *Boyle*, the Court found that the defense could be invoked because "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" within the meaning of 28 U.S.C. 2680(a), and Congress intended to immunize the United States from tort liability for making such design decisions. 108 S. Ct. at 2517. See *Gordon* v. *Lykes Bros. Steamship Co.*, 835 F.2d 96, 100 (5th Cir.), cert. denied, 109 S. Ct. 73 (1988) (holding the government's decision to promulgate specifications requiring the use of asbestos on ships to be protected by the discretionary function exception). Thus, the Court recognized that Congress intended to insulate military product design decisions from judicial second-guessing by way of tort suits against the United States *or* against contractors following government orders. If, as

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[17] Thus, Eagle-Picher's heavy reliance (Pet. 18-21) on the court of appeals' statement that the military specifications for its products were performance specifications misses the mark. The dispositive factor in the court of appeals' analysis was the simple matter that petitioners were not able to assert that the products it sold to the United States were in any relevant respect different from those sold to their private commercial customers. Since the specifications were not alleged to have been different in any significant respect from those sold commercially, it is irrelevant whether they were design or performance specifications.

petitioners claim, they were asked to sell the government products with which they were not familiar, and if the government is the truly culpable party, petitioners would not be liable to the underlying plaintiffs (as a result of the military contractor defense), and there would be no basis for contribution or indemnity on any theory.[18]

Finally, a judgment against the United States on an implied reverse warranty theory would be contrary to Congress's intent, embodied in the discretionary function exception, to immunize the United States from tort liability for design decisions involving military products. Cf. *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[18] Like the court below (Pet. App. 13a), we do not wish to be understood as arguing that there is merit to petitioners' claim in the nationwide asbestos litigation (see, *e.g.*, *In re Alameda Complex Asbestos Litigation*, 251 Cal. Rptr. 805, 809-810 (Cal. App. 1988)) that they are, in fact, protected from liability to the underlying plaintiffs by the military contractor defense.

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